Florida's Open Government Laws: No Exceptions for Attorney-Client Communications

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I. Introduction

The Florida Supreme Court has recently clarified the previously ambiguous relationship between two important public interests: the public entity client's interest in confidentiality in its attorney-client communications, and the public interest in principles of open government. This Comment discusses those differing interests and explains how the court resolved the conflict between them.

The attorney-client privilege has its roots in the common law and has existed for hundreds of years. The reason generally given for allowing the privilege is that confidential communication between an attorney and his client is necessary for the lawyer to prepare for litigation and for the client to receive effective legal advice. The Florida legislature recognized the importance of the privilege when it included a statutory attorney-client privilege in the Florida Evidence Code that was adopted in 1976.

The Florida legislature has also recognized the importance of permitting the citizens of Florida to have access to the decision-making processes of state government. In order to promote such public involvement, the legislature enacted the Public Records Act in 1909 and the Government in the Sunshine Law in 1967. The effect of these open government laws has been to limit secrecy in government by allowing the public to attend most official meetings and inspect most public records.

Both the attorney-client privilege and open government laws are legislative expressions of important public policies. However, these policies are in frequent conflict. While they promote access to government, open government laws have also made it difficult for public officials to seek legal advice in the course of conducting public business. Normally, those types of communications would be made confidentially and therefore would be privileged under the attorney-client privilege. This confidentiality may be important to pub-
lic officials, particularly in sensitive situations such as the discussion of pending litigation. Under the open government laws, however, all of these communications would be subject to disclosure. The legislature has not been able to resolve the problem of how to strike a proper balance between the two policies. Until the recent pronouncements of the Florida Supreme Court on the subject, the courts also had a difficult time balancing the conflicting interests. However, the Florida Supreme Court has resolved the controversy in two recent cases which hold that the policies of open government must prevail and that the attorney-client privilege does not create exemptions from the open government laws.\(^5\)

Part I of this Comment examines the relationship between the attorney-client privilege and the open government laws. Part II sets out the laws in question and explains the public policies behind the laws. Part III examines the various ways that the courts have tried to balance the policy considerations and how the courts have tried to define the relationship between the open government laws and the attorney-client privilege. Part IV reviews the effect of the recent holdings of the Florida Supreme Court on the future of open government laws and attorney-client relations of public entity clients.

II. AN OVERVIEW OF THE RELEVANT STATUTES

A. Florida's Statutory Attorney-Client Privilege

Florida's Evidence Code provides for a statutory attorney-client privilege. In relevant part, the law states: "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client."\(^6\) This privilege is based on the common law attorney-client privilege. It is permitted because courts have decided that the interests of justice require that people seeking legal advice be able to talk freely to their attorney without fear of the consequences of disclosure. The United States Supreme Court has said that the purpose of the attorney-client privilege is to encourage clients to make full disclosure to their attorneys. Without the privilege, Justice White explained,
“the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.”

Florida courts have invoked similar policy considerations in support of the privilege. In Anderson v. State, the court said that the policy behind the attorney-client privilege is to promote consultation with attorneys by removing the fear of compelled disclosure. Quoting Wigmore, the court said that the reason for the privilege is to “secure the client’s freedom of mind. . . . It is designed to influence him when he may be hesitating between the positive action of disclosure and the inaction of secrecy.”

B. The Public Records Act

The Public Records Act states in relevant part that “[i]t is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person.” Public records are defined as “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Public documents may be inspected and examined “by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or his designee.”

The Public Records Act also contains a list of exceptions to the Act. It states that “[a]ll public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, are exempt from the provisions of subsection (1).”

The Public Records Act was the first of Florida’s so-called “open government laws.” It became law in 1909. Its purpose, like the Sunshine Act that was subsequently enacted, was to allow greater public involvement in the government decisionmaking process by opening up records to public scrutiny. As Judge Kaney explained in Browning v. Walton, “[t]he purpose of this Statute was to open

8. 297 So. 2d 871, 871-72 (Fla. 2d DCA 1974).
9. Id. at 872 (quoting 8 J. WIGMORE, EVIDENCE § 2306 (J. McNaughton rev. ed. 1961)).
10. FLA. STAT. § 119.01(1) (1983).
11. Id. § 119.011(1).
12. Id. § 119.071(1)(a) (Supp. 1984).
13. Id. § 119.073(1)(a)-(p).
the records so the citizens could discover what their government was doing.\footnote{15}

\textbf{C. The Government in the Sunshine Law}

Florida's other open government law is the Government in the Sunshine Law. It provides in relevant part:

All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.\footnote{16}

This law was enacted in 1967. Two years later, in the case of \textit{Board of Public Instruction v. Doran},\footnote{17} Justice Adkins explained the rationale behind the law:

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with "hanky panky" in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies.\footnote{18}

\textbf{D. Legislative Reaction to Friction Created by the Statutes}

It is obvious that the policies represented by these laws are in conflict. If government entities are permitted to communicate secretly with their attorneys pursuant to an attorney-client privilege, then the public will be denied access to some public meetings and records. On the other hand, if the public is permitted access to communications between government entities and their attorneys pursuant to the open government laws, then government entities

\footnotesize{\begin{itemize}
\item 15. 351 So. 2d 380, 381 (Fla. 4th DCA 1977).
\item 17. 224 So. 2d 693 (Fla. 1969).
\item 18. \textit{Id.} at 699.
\end{itemize}}
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will be denied the benefit of confidential legal advice.

The legislature has failed to effectively deal with the conflict that was created and has been unable to enact any statute that would unambiguously resolve the controversy. Since 1977, there have been several unsuccessful attempts to pass legislation that would resolve the issue by granting more protection to the attorney-client relationships of government entities. The legislature came close to successfully resolving the conflict in 1977, when it passed House Bill 1107. The bill would have created a limited exception to the Sunshine Law for attorney-client communications by permitting public bodies involved in litigation to meet secretly with their attorney to discuss future action in the litigation. However, the bill was vetoed by Governor Reubin Askew on June 29, 1977.

This legislative inaction has made resolution of the conflict even more complicated. Parties on both sides of the issue point to the unwillingness of the legislature to enact a statute and argue that the inaction supports their claims. Parties favoring a liberal interpretation of the open government laws claim that the failure to pass legislation proves the legislature does not intend to create an attorney-client privilege exception to the open government laws. Advocates of the privilege respond that the inaction indicates merely that the legislature knows that no action is necessary because the Evidence Code already provides such an exception.

A related issue, whether Florida's open government laws preclude a claim of work product privilege by attorneys working for the state, has recently been resolved by the legislature. Work product is material prepared by an attorney in anticipation of litigation. It can include memoranda, statements of witnesses, mental impressions, conclusions, opinions, or legal theories of an attor-

19. A list of bills which have failed to pass the legislature since 1977 includes: Fla. HB 687 (1982) (would have created attorney-client privilege exception to Public Records Act); Fla. HB 785 (1981) (would have required parties engaged in litigation with public agencies to waive their attorney work product privilege as a consequence of a Public Records Act request); Fla. HB 1180, Fla. SB 926, and Fla. SB 1087 (1980) (would have created attorney-client privilege exemption from Public Records Act); Fla. HB 1617 (1979) (would have prevented Public Records Act from being used to expand scope of discovery). In 1983, the legislature rejected a proposal made by the Florida League of Cities to create an exception for attorney-client communications.


The Florida Rules of Civil Procedure provide for a limited privilege for work product. The rules protect certain documents prepared by attorneys regardless of whether the documents are related to an attorney's confidential communications with a client. But documents prepared by attorneys working for state agencies could also be considered public records and could be subject to the disclosure requirements of chapter 119. In 1984, the legislature resolved this conflict by creating a narrowly drawn exception to the Public Records Act for certain work product prepared by an attorney working for a state agency. The newly enacted subsection provides:

A public record which was prepared by an agency attorney, including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record, or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared in anticipation of imminent civil or criminal litigation or adversarial administrative proceedings, is exempt from the disclosure requirements of the Public Records Act until the conclusion of the litigation or adversarial administrative proceedings.

While this legislation resolves the work product issue, it is not dispositive of the issue of the attorney-client privilege. Instead, it merely provides more fuel for parties arguing both sides of the attorney-client issue. For example, rules of statutory construction, such as the maxim expressio unius est exclusio alterius, may be used to support the contention that the legislature did not intend to create an attorney-client privilege exception to the Public Records Act. Under that rule, when the legislature creates specific exceptions to the statute it can be inferred that if the legislature had intended to establish other exceptions it would have done so clearly and unequivocally. Conversely, it can be argued that the statutory enactment of the Evidence Code itself provided a clear and unequivocal exception for the attorney-client privilege.


Given the aforementioned conflict and legislative ambiguity, it is not surprising that until the recent Florida Supreme Court decisions, the courts have had difficulty in attempting to reconcile the statutes. This Part discusses the cases that have come before the courts dealing with this issue and examines the attempts by the courts and the Florida Attorney General to define the relationship between open government and the attorney-client privilege.

A. Cases Interpreting the Sunshine Act

The language of the Government in the Sunshine Act is very broad: “All meetings . . . except as otherwise provided in the Constitution . . . are declared to be public meetings open to the public at all times. . . .”27 The legislature has rarely provided for exemptions from the Sunshine Act. The policy of favoring open meetings in most circumstances was reaffirmed by the 1984 legislature when it amended the Public Records Act. While the legislature revisited old exceptions in subsection 3 of the Act and even created a new work product exemption, it expressly provided that “[n]othing in this subsection shall be interpreted as providing an exemption from or exception to [the Sunshine Act].”28 Similarly, the courts have held that because the Sunshine Act was enacted for the public benefit, it should be broadly interpreted in a way that would be most favorable to the public.29

Consequently, it was not surprising when the Florida Supreme Court held that the attorney-client privilege does not create an exception to the Sunshine Act in the recent case of Neu v. Miami Herald Publishing Co.30 In fact, this conclusion seemed inevitable in light of the cases that were decided before Neu.

In one of the first cases interpreting the Sunshine Act, Board of Public Instruction v. Doran,31 the Florida Supreme Court indicated just how broadly the statute was to be construed when it stated: “The obvious intent [of the legislature] was to cover any gathering of the members [of a public body] where the members deal with some matter on which foreseeable action will be taken by

28. Ch. 84-298, § 5, 1984 Fla. Laws 1398, 1400-03.
30. 462 So. 2d 821 (Fla. 1985).
31. 224 So. 2d 693 (Fla. 1969).
the [public body]."32 In Doran, the Broward County School Board had established a pattern of meeting informally, in private, in order to discuss three subject areas which they considered too sensitive to make public. The subjects discussed privately were matters involving possible castigation or suspension of personnel, acquisition of or sale of real estate, and matters about which the board wanted to confer with attorneys. The board would discuss these matters privately but would not make any decision except at meetings held "in the sunshine."33 A citizen brought suit to enjoin the private meetings. The board claimed that since the actual decisions were made at public meetings, no violation of the Sunshine Act had occurred. The board also claimed that there were valid policy reasons for not discussing such matters in public.

The Florida Supreme Court disagreed and held that the public could not be excluded from the meetings. In an opinion strongly supportive of the goals of open government, Justice Adkins wrote: "Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made."34 Responding to the complaints of the board about the impracticability and unfairness of requiring all meetings to be held in the sunshine, Adkins advised that such "causes of complaint, if deserving, are matters for the Legislature, not the courts."35

The Doran holding undermined a decision made earlier by the Second District Court of Appeal, Times Publishing Co. v. Williams.36 In that case, the Times Publishing Company sought an injunction to prevent the Pinellas County School Board from holding secret meetings.37 The Pinellas Board, like the Broward County School Board, claimed that secret meetings were permitted, notwithstanding the Sunshine Law, when the meetings were held to discuss school personnel or to consult with attorneys. The circuit court dismissed the suit, but the district court reversed. Writing for the court, Chief Judge Liles interpreted the Sunshine Act liberally and said that the legislature obviously intended to permit the

32. Id. at 698.
33. Id. at 697.
34. Id. at 699.
35. Id. at 700.
36. 222 So. 2d 470 (Fla. 2d DCA 1969).
37. Id. at 472.
public to attend all meetings. But, in dicta, the court did leave open one narrow exception to the Act.\textsuperscript{38} That exception was for attorney communication "where public consultation with its attorney regarding pending or impending litigation would force him to violate the Canons of Ethics as promulgated by the Supreme Court."\textsuperscript{39} Notably, the Florida Supreme Court did not recognize such an exception in \textit{Doran}.

\textit{Doran}'s broad interpretation of the Sunshine Law was reaffirmed in \textit{City of Miami Beach v. Berns}.\textsuperscript{40} The issue before the supreme court in \textit{Berns} was whether the Sunshine Act had superseded an earlier open meeting statute that had only applied to municipal councils when they were assembled in a formal session attended by a quorum.\textsuperscript{41} The court in \textit{Berns} held that the statute was indeed superseded by the Sunshine Act and that the Act applied both to formal and informal meetings of public bodies. Part of the court's rationale was that it had previously construed the Sunshine Act to prohibit closed meetings since the \textit{Williams} decision in 1969. In \textit{Williams}, the court had noted that if the legislature disagreed with the expansive interpretation then it could change the law either by amendment or supplementary legislation.\textsuperscript{42} Because the legislature had not amended the statute, Justice Adkins concluded, it would be presumed that the legislature's intent was to allow no exceptions to the Act.\textsuperscript{43}

In addition to affirming the supreme court's broad interpretation of the Sunshine Act, the \textit{Berns} decision illustrated that the court did not intend to adopt an exception for attorney-client communications, even one as narrow as that permitted in \textit{Williams}. The Attorney General's office notes that prior to the issuance of the \textit{Berns} decision, a different opinion had been prepared by the supreme court. The earlier opinion appeared to approve the \textit{Williams} exception, but when that was pointed out to the court, the original opinion was withdrawn.\textsuperscript{44}

In light of these opinions, and particularly in light of the statutory language which states that exceptions shall only be made as provided by the Florida Constitution, the effect of the attorney-

\begin{itemize}
  \item \textsuperscript{38} \textit{Id.} at 474. \\
  \textsuperscript{39} \textit{Id.} at 476-77. \\
  \textsuperscript{40} 245 So. 2d 38 (Fla. 1971). \\
  \textsuperscript{41} \textit{Id.} at 39; see Turk v. Richard, 47 So. 2d 543 (Fla. 1950). \\
  \textsuperscript{42} \textit{Williams}, 222 So. 2d at 474. \\
  \textsuperscript{43} \textit{Berns}, 245 So. 2d at 41. \\
  \textsuperscript{44} See \textit{Florida Open Government Laws Manual} 19 (1984 ed.).
\end{itemize}
client privilege on the Sunshine Law would appear to be a simple issue. The supreme court had said there should be no judicial exceptions. The statute provided that exceptions were to be made only by the constitution; therefore, the Evidence Code should not create an exception to the Sunshine Law. But such simplicity was not the case. Despite the statutory and judicial language, the issue became more complicated as a result of limited statutory and judicial exceptions to the Sunshine Law.\footnote{45. For a discussion of exceptions to both the Sunshine Act and the Public Records Act, see Comment, \textit{infra} note 133.}

The 1984 \textit{Florida Open Government Laws Manual}, published by the Attorney General's office, listed ten exceptions to the Sunshine Act that were expressly stated in other parts of the Florida Statutes.\footnote{46. The exceptions listed are FLA. STAT. § 106.25(5) (1983) (exempting certain documents and reports filed with the Division of Elections); \textit{id.} §§ 110.201(4), 447.605(1) (exempting certain discussions relating to collective bargaining); \textit{id.} § 112.324(1) (exempting certain proceedings of the Ethics Commission); \textit{id.} § 230.23(4)(m)(4) (exempting certain hearings regarding student placement); \textit{id.} § 240.209(2) (exempting activities of the search committee for selection of Chancellor of the State University System); \textit{id.} §§ 395.010(3), 395.0115(3) (exempting certain proceedings of a probable cause panel). For a complete list of exceptions to the open government laws, see \textit{FLORIDA OPEN GOVERNMENT LAWS MANUAL} 69-105 (1984 ed.).}

The courts have not been called upon to decide whether such statutory exceptions are proper, or whether the Act can be excepted only by the constitution. But they have indirectly answered that question in the affirmative by allowing statutory and, in certain cases, even judicially-created exemptions.

In \textit{Bassett v. Braddock},\footnote{47. 262 So. 2d 425 (Fla. 1972).} the supreme court held that labor negotiators could meet privately with the members of a school board to consult about their negotiations. Reasoning that the constitution provides public employees the right to collective bargaining,\footnote{48. FLA. CONST. art. I, § 6.} the court concluded that this right would be meaningless without the ability to discuss negotiations in private.\footnote{49. \textit{Bassett}, 262 So. 2d at 426.} The significance of \textit{Bassett} is its recognition that constitutional exceptions to the Sunshine Act need not be express, but may be judicially implied when a constitutional provision is found to conflict with the Act. The court may have been reaching for a constitutional basis for the exception because of its concern about the fairness of the negotiation process. Writing for the court, Justice Deckle explained:
The public's representatives must be afforded at least an equal position with that enjoyed by those with whom they deal. The public should not suffer a handicap at the expense of a purist view of open public meetings, so long as the ultimate debate and decisions are public and the "official acts" and "formal action" specified by the statute are taken in open "public meetings."  

Justice Adkins' well-reasoned dissent raises doubts about the validity of claims that the exception was based upon a provision of the constitution. In any case, whether the justification was valid seems largely irrelevant in light of the fact that a statutory exception to the Sunshine Act was permitted in Tribune Co. v. School Board of Hillsborough County.  

The law in question in Tribune Co. was chapter 69-1146, section 5, a special law enacted for the Hillsborough School Board dealing with the board's disciplinary proceedings. The law allowed the individual teacher undergoing disciplinary review to decide if his or her hearing would be public or private. The Tampa Tribune, which had been barred from such a hearing, claimed that the law was an invalid delegation of statutory authority because it permitted the individual teacher to decide whether the Sunshine Act would apply. Disagreeing with the Tribune, the supreme court held that the law was valid and permitted the statutory exemption to the Sunshine Act. Once again, Justice Adkins dissented, suggesting that the right of the public to know might eventually become a constitutional right.  

Thus the court has permitted express statutory exemptions for the Sunshine Act. But until Neu it had not determined the effect of a subsequent statute, such as the Evidence Code, which implicitly conflicts with the Sunshine Law but does not expressly constitute an exception.  

The First District Court of Appeal faced that issue but was able to avoid a decision in Mitchell v. School Board of Leon County. Ruth Mitchell was a former teacher whose position had been eliminated as a result of a school board reorganization plan. Mitchell brought suit, claiming the board had acted improperly in abolishing her position. Seeking to discover information that was used in

50. Id. at 427.
51. Id. at 429 (Adkins, J., dissenting).
52. 367 So. 2d 627 (Fla. 1979).
53. Id. at 629.
54. Id. (Adkins, J., dissenting).
55. 335 So. 2d 354 (Fla. 1st DCA 1976).
formulating the reorganization plan, Mitchell deposed school officials to ascertain the substance of conversations they had had with the school board's attorneys. The school board claimed that the conversations were privileged communications. Mitchell claimed that they were subject to disclosure pursuant to the Sunshine Act.\footnote{Id. at 355.}

The district court was able to avoid deciding whether the attorney-client privilege created an exception to the Sunshine Act, because the Act itself does not apply in this situation. The court held that the Act required a meeting of two or more public officials. Since no such meeting had occurred, the Act did not apply.\footnote{Id. at 356.} The court said it would "await a case involving appropriate facts" before deciding the attorney-client issue.\footnote{Id.} But the court did hint at what its conclusion might be when it stated: "[The] law was never intended to become a millstone around the neck of the public's representatives when being sued by a private party, nor should it be construed to discourage representatives of the people from seeking legal counsel."\footnote{Id. at 355.}

The Third District Court of Appeal did decide that issue in the case that was eventually decided by the supreme court, \textit{State ex rel. Reno v. Neu}.\footnote{434 So. 2d 1035 (Fla. 3d DCA 1983) (per curiam), aff'd, 462 So. 2d 821 (Fla. 1985).} The district court held that the privilege did not create an exception to the Sunshine Act. The supreme court affirmed that decision.

The \textit{Neu} case arose when the members of the city council of the City of North Miami planned a meeting with their attorney. The council planned to hold the meeting in private so that the council members could discuss pending litigation and decide on settlement options. The \textit{Miami Herald} claimed that such a private meeting was a violation of the Government in the Sunshine Act. The \textit{Herald} and State Attorney Janet Reno sought a declaratory judgment from the circuit court that the meeting should be subject to the requirements of the Sunshine Act.\footnote{Neu, 434 So. 2d at 1035.}

The trial court held that the Sunshine Act did not apply and that the meeting could be held in private.\footnote{Id.} On appeal, the Third District reversed the trial court and held that the proposed private
meeting would have been in violation of the Sunshine Act. The district court relied upon several opinions of the Florida Supreme Court in reaching its decision. It cited both Board of Public Instruction v. Doran and City of Miami Beach v. Berns for the proposition that a city council cannot exclude the public from meetings, even when pending litigation is scheduled to be discussed.

Both Doran and Berns were decided before the effective date of the Florida Evidence Code. Nevertheless, the Third District's per curiam decision reasoned that despite the fact that the Evidence Code was now in effect, it would not affect the Herald case because exceptions to the Sunshine Act could only be created by the state constitution. The court recognized that the issue was of "obvious continuing significance" and for that reason offered the supreme court the opportunity to revisit the issue by certifying the question: "Whether the Sunshine Law applies to meetings between a City Council and the City Attorney held for the purpose of discussing the settlement of pending litigation to which the city is a party."

On appeal, the supreme court used the case to resolve three issues related to the Sunshine Act. First, it held that a government entity could not create an intermediate category of meeting in order to resolve the conflict between the Sunshine Act and the attorney-client privilege. The North Miami city council had tried to use such a procedure that would have permitted representatives of the press and others to the meeting provided they pledged to respect the confidentiality of the case discussed until the case could be resolved. The supreme court found that this compromise could not be permitted because "under the Sunshine Law, a meeting is either fully open or fully closed; there are no intermediate categories."

Second, the court found that the Third District had been incorrect when it suggested that exceptions to the Sunshine Law could only be made by the constitution. This is not true because the legislature "may not bind the hands of future legislatures by prohibit-

63. Id. at 1036.
64. 224 So. 2d 693 (Fla. 1969).
65. 245 So. 2d 38 (Fla. 1971).
66. Neu, 434 So. 2d at 1035-36.
67. Id. at 1036.
68. Id.
The court next held that the Evidence Code does not create an exception to the Sunshine Act. In reaching its conclusion, the court relied primarily upon legislative history which indicated that the legislature did not intend to create such an exception. In particular, the court noted that the 1977 legislature did attempt to enact a bill that would have permitted governmental bodies to meet privately with their attorneys to discuss pending litigation. This bill successfully passed the legislature, but was vetoed by Governor Reubin Askew. A logical conclusion that could be drawn from this attempted enactment is that the legislature did want to create an exception for attorney-client communications. However, the court ignored this inference and instead found that the significance of the Act is that "it clearly indicates that the legislature . . . did not intend by its earlier enactment of [the attorney-client privilege] to create an exception to the Sunshine Law for attorney/client meetings. If it had so intended, HB 1107 would have been a pointless act." In reaching its conclusion, the court rejected several other arguments made by the petitioners. The petitioners had urged that the court's previous opinion in Bassett v. Braddock permitted private meetings to discuss litigation. While admitting that some of the language in Bassett might be considered broad enough to support such an assertion, the decision was actually restricted to one exception based in the constitution—the right of public employees to bargain collectively. The court also rejected an argument that the Sunshine Act is in conflict with the requirement of confidentiality under the Code of Professional Responsibility. This attorney-client privilege actually belongs to the client and, as the court explained, the legislature waived the privilege by enacting the Sunshine Act. The petitioner's arguments based upon due process rights to consult with an attorney were also rejected because the United States Supreme Court had previously rejected such claims.

Finally, the petitioner argued that the court's previous decisions giving a broad interpretation to the Sunshine Act should be reversed because they "effectively strangled the political process in

70. Id.
71. Id.
72. 262 So. 2d 425 (Fla. 1972).
73. Neu, 462 So. 2d at 824.
74. Id.
Florida" and provided an unfair advantage to private litigants. The court responded to this argument as it had always done by reminding the petitioner that "‘this argument should be addressed to the legislature.’" Joining in the majority opinion were Chief Justice Boyd and Justices Adkins, Ehrlich, and Shaw. But perhaps of equal significance to the ultimate effect of the opinion were a concurrence and a dissent, each by two justices.

In a special concurrence written by Justice Overton in which Justice Ehrlich joined, Justice Overton emphasized that the opinion only applied to "meetings of boards, commissions . . . where official acts are taken." Citing the court’s previous decisions in Wood v. Marston and Occidental Chemical Co. v. Mayo, the justices noted that neither the Sunshine Law nor the court’s opinion would apply to the executive officers of governmental entities. Thus, a government executive, such as a governor or city manager, could meet with an attorney in private to discuss the legal affairs of the public entity in confidence without violating the Sunshine Law.

Justice McDonald dissented and was joined by Justice Alderman. They stated that there were "no public policy reasons to extend the Sunshine Law to govern communications between a public body and its attorneys concerning litigation in which the public body is a party." Thus they concluded that the attorney-client privilege did create an exception to the Sunshine Act because "it was [not] the original intent of the legislature to abrogate the attorney-client confidentiality rule."

B. Cases Interpreting the Public Records Act

The language of the Public Records Act is also very broad: "[A]ll state, county, and municipal records shall at all times be open for a personal inspection by any person." If this were the only language of the statute, there would be no question that the attorney-client privilege could not be an exception to the Act.

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76. Neu, 462 So. 2d at 825.
77. Id. at 826 (quoting Wait v. Florida Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979)).
78. Neu, 462 So. 2d at 826.
79. 442 So. 2d 934 (Fla. 1983).
80. 351 So. 2d 336 (Fla. 1977).
81. Neu, 462 So. 2d at 826.
82. Id.
83. Id.
However, the legislature and the courts have recognized that "the right to know must occasionally be circumscribed when the potential damages far outweigh the possible benefits." For this reason, when the legislature enacted chapter 119, it included a list of exceptions to the law.

One of the exceptions which is found within the Public Records Act itself is that "[a]ll public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public" are exempt from the requirements of disclosure. Proponents of an attorney-client privilege exception to the Public Records Act relied upon that language to claim that the legislature has already created such an exception by its enactment of the Evidence Code. But because the attorney-client privilege is not expressly included in the list of Public Records Act exceptions, judicial interpretation of the statute was necessary.

Despite the fact that the most recent case decided by the Florida Supreme Court held that the evidence code did not create an attorney-client exception to the Public Records Act, earlier lower court interpretation did imply that such an exception existed. The line of cases that seemed to support an exception began before 1979 when, for public policy reasons, the courts occasionally enlarged the list of exceptions contained in the Public Records Act. The justification for such judicial exceptions was that the law had previously exempted all public records "deemed by law" to be confidential or prohibited from inspection. Courts interpreted this "deemed by law" language to mean that exceptions could be created by the courts as well as by statute.

The Second District Court of Appeal created just such an exception in Wisher v. News-Press Publishing Co. In that case, the

86. FLA. STAT. § 119.07(3)(a)-(n) (1983).
87. Id. § 119.07(3)(a).
88. See id. § 119.07(2)(a) (1973).
89. 310 So. 2d 345 (Fla. 2d DCA 1975), quashed and remanded, 345 So. 2d 646 (Fla. 1977). The supreme court avoided the issue of whether an exception to the Public Records Act should be created for confidential records such as personnel files. Instead, it held that the specific document which the newspaper sought to have disclosed—the warning of possible termination—could not be exempt from the Public Records Act because it was not confidential. The court noted that the warning had not been provided by a private source who had been promised confidentiality but was authored by a public body at an open public meeting. Because the warning was not confidential, the court held there was no need to reach the issue of whether confidential documents should be exempted from open government laws. Id. at 647.
local newspaper, the *Fort Myers News-Press*, sought disclosure of the personnel files of all the department heads employed by Lee County. The *News-Press* wanted to examine the records to discover the name of the department head who had been reprimanded by the Lee County Board of County Commissioners. The employee had been discussed, but not named, at a commission meeting. The newspaper knew that it would be able to identify the employee if permitted to examine the personnel files, because the commissioners had agreed to place a warning in the employee's file.\(^9\)

Lee County refused to allow examination of the personnel records, and the *News-Press* obtained a writ of mandamus ordering disclosure of the records.\(^1\) On appeal, the district court conceded that the personnel files were public records and were not expressly exempted from disclosure by the statute.\(^2\) However, the court relied upon the "deemed by law" language in the statute to hold that courts could also create exemptions as a matter of public policy.\(^3\) After reviewing the private and confidential nature of personnel records, the court held that "public disclosure of the personnel files of governmental employees could result in irreparable harm to the public interest and would be against the public policy."\(^4\)

During the 1975 legislative session, immediately after the *Wisher* decision, the Public Records Act was amended. The phrase "deemed by law" that the *Wisher* court had relied upon to create a judicial exception was changed to "provided by law."\(^5\)

The significance of that amendment was first noted by the Fourth District Court of Appeal in *State ex rel. Veale v. City of Boca Raton*.\(^6\) In *Veale*, the City of Boca Raton directed its assistant city attorney to investigate irregularities in the city's building department. The *Boca Raton News* sought disclosure of the report that was made as a result of those investigations. The city, relying upon the attorney-client privilege and the *Wisher* decision, refused

\(^{90}\) *Wisher*, 310 So. 2d at 346.

\(^{91}\) *Id.*

\(^{92}\) *Id.* at 347.

\(^{93}\) *Id.* at 349.

\(^{94}\) *Id.* at 348.


\(^{96}\) 353 So. 2d 1194 (Fla. 4th DCA 1977), cert. denied, 360 So. 2d 1247 (Fla. 1978). The lower court opinion was authored by Judge Schwartz, Chief Judge of the Third District, sitting by designation.
to make the report public. Max Veale, managing editor of the *Boca Raton News*, petitioned for a writ of mandamus, but the petition was dismissed by the trial court.\(^7\)

The Fourth District Court of Appeal reversed, holding that the report was a public record subject to chapter 119 disclosure requirements. Writing for the court, Judge Schwartz said that the 1975 amendment to the Public Records Act, which changed the words “deemed by law” to “provided by law,” precluded any judicial exceptions to chapter 119. The court reasoned that the phrase “deemed by law” included opinions and decisions of courts, but that “provided by law” could only mean provided by statute.\(^8\) Judge Schwartz noted that this conclusion was inevitable in light of the Florida Supreme Court’s handling of the *Wisher* case. Jurisdiction in *Wisher* was based upon its conflict with the supreme court’s earlier decision in the case of *State ex rel. Cummer v. Pace*.\(^9\) *Pace* specifically held that the creation of nonstatutory exceptions was beyond the purview of the courts.\(^{100}\) By quashing and remanding *Wisher*, the Florida Supreme Court implicitly reaffirmed the *Pace* decision, thus leaving the *Veale* court with little choice other than to arrive at a similar conclusion.\(^{101}\)

Chief Judge Alderman of the Fourth District Court of Appeal concurred with Judge Schwartz on the *Veale* opinion. Two years later, Alderman, by then a Florida Supreme Court justice, relied upon the *Veale* rationale when the supreme court decided the case of *Wait v. Florida Power & Light Co.*\(^{102}\)

The *Wait* case was the first time that the Florida Supreme Court dealt with the conflict between open government laws and the attorney-client privilege. The case arose out of litigation before the United States Nuclear Regulatory Commission between the City of New Smyrna Beach (New Smyrna) and Florida Power and Light Company (FPL). The litigation concerned the construction and operation of FPL’s nuclear power plants.

During pretrial discovery, FPL sought to inspect New Smyrna’s records of the planning, operation, and maintenance of the city’s electrical system. New Smyrna claimed that in order to remove any information that was confidential, its attorney would have to re-

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\(^7\) Id. at 1195.
\(^8\) Id. at 1196.
\(^9\) 159 So. 679 (Fla. 1935).
\(^{100}\) Id. at 681.
\(^{101}\) Veale, 353 So. 2d at 1197.
\(^{102}\) 372 So. 2d 420 (Fla. 1979).
view all the documents before FPL could inspect them. For this reason, New Smyrna denied FPL the right to inspect the records. FPL, relying upon the Public Records Act, claimed that it had a right to inspect all of New Smyrna's documents. FPL sought a writ of mandamus in the circuit court to obtain access to the documents.\textsuperscript{103} The circuit court granted the writ; the First District Court of Appeal affirmed.\textsuperscript{104}

New Smyrna appealed, but the Florida Supreme Court held that FPL had the right to inspect the documents.\textsuperscript{105} The supreme court held that when the legislature enacted the Public Records Act, it intended to exempt from disclosure only those public records which had been made confidential by statutory law. Documents which were confidential in nature as a result of judicial construction, such as the judicially created attorney-client privilege, were not exempt from disclosure.\textsuperscript{106} Florida's statutory attorney-client privilege, contained in the Evidence Code, had not yet taken effect.

The supreme court came to its decision after considering the history of the Public Records Act and its exceptions. The court noted that, as first enacted, the law exempted public records that were "deemed by law" to be confidential, but that in 1975 the legislature had amended the statute to restrict the exceptions to only those "provided by law." Writing for the court, Justice Alderman noted that this change had occurred after \textit{Wisher}. The court in \textit{Wisher}, relying upon the "deemed by law" language, held that nonstatutory public policy considerations could be used to restrict access to documents that would otherwise be open to inspection under the Public Records Act.\textsuperscript{107} Given the prompt change in the statute after the \textit{Wisher} decision, the supreme court agreed with the reasoning in \textit{Veale} that "'[i]t seems obvious . . . that the very purpose of the statutory amendment was specifically to overrule the Second District \textit{Wisher} conclusion and preclude judicially created exceptions to the Act in question.'"\textsuperscript{108}

Therefore, the \textit{Wait} court held that exceptions to the Public Records Act could only be made by statute. However, \textit{Wait} did not finally resolve the question of the relationship between open government laws and the attorney-client privilege. The relevance of

\begin{itemize}
\item \textsuperscript{103} \textit{Id.} at 422.
\item \textsuperscript{104} \textit{Id.} at 423.
\item \textsuperscript{105} \textit{Id.} at 422.
\item \textsuperscript{106} \textit{Id.} at 424.
\item \textsuperscript{107} \textit{Id.}
\item \textsuperscript{108} \textit{Id.} (quoting \textit{Veale}, 353 So. 2d at 1196).
\end{itemize}
the *Wait* opinion appeared to be undermined by the Florida Evidence Code, which took effect after the decision was handed down.\(^{109}\)

The *Wait* decision was of limited applicability because it was decided on the basis of the common law attorney-client privilege. Justice Alderman's opinion seemed to suggest that a statutory privilege might create an exception to the Public Records Act: "If the common law privileges are to be included as exemptions, it is up to the legislature, and not this Court, to amend the statute."\(^{110}\) This language, together with the court's holding that only public records "made confidential by statutory law" are exempted from the Public Records Act, led some courts to conclude in subsequent cases that the attorney-client privilege in the Evidence Code created an exception to the Act.

The first reported opinion to hold that the statutory attorney-client privilege created an exception to the Public Records Act was *City of Tampa v. Titan Southeast Construction Corp.*\(^{111}\) *Titan* was a declaratory judgment action to determine whether the Public Records Act required the city of Tampa to disclose documents that were attorney-client communications, or whether the Evidence Code exempted the communications from disclosure requirements.

In a memorandum opinion by Judge Carr, the court noted that *Wait* precluded exceptions to the Public Records Act that were based on the common law attorney-client privilege. But Carr also noted that shortly after the *Wait* decision the Evidence Code had taken effect.\(^{112}\) The Code had created a statutory attorney-client privilege, and its definition of client included "any . . . organization or entity, either public or private, who consults a lawyer."\(^{113}\) The court explained that "[t]he inclusion of public entities within the definition of client suggests that the legislature intended to extend the lawyer-client privilege to municipal organizations, thereby exempting their attorney-client documents from disclosure pursuant to the Public Records Act."\(^{114}\)

The court admitted that the legislature did not create the exemption by specifically amending the Public Records Act, but the

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109. See C. EHRHARDT, supra note 1, § 502.4.
111. 535 F. Supp. 163 (M.D. Fla. 1982).
112. *Id.* at 165.
court stated that the Florida Supreme Court had not required all exemptions to be made in such a manner.\textsuperscript{118} Even more significant to the district court was the fact that other laws had authorized nondisclosure but were not made a part of chapter 119.\textsuperscript{116} The court also noted that the legislature is presumed to know the law when it enacts a statute. Accordingly, the federal court came to the conclusion that, when the legislature enacted the Evidence Code, it did intend to create an exception to the Public Records Act without specifically amending chapter 119.\textsuperscript{117}

In summing up its well-reasoned decision, the court stated:

\begin{quote}
[T]he \textit{Wait} decision stands for the proposition that it is up to the legislature to define, by statute, the privileges to which a public entity is entitled. The legislature did just that when it passed the Evidence Code and recognized "public" entities as "clients" that have "a privilege to refuse to disclose, and to prevent any other person from disclosing" lawyer-client communications. . . . The City of Tampa has chosen to exercise that privilege and, therefore, can withhold from Titan the lawyer-client communications Titan has requested.\textsuperscript{118}
\end{quote}

Although no Florida appellate court expressly adopted the \textit{Titan} holding, there were five reported decisions that acknowledged the holding. In those cases, the courts seemed to explicitly adopt the \textit{Titan} rationale, yet at the same time they attempted to avoid the issue until the Florida Supreme Court had ruled on the question.

One example is \textit{Tober v. Sanchez},\textsuperscript{119} decided four months after \textit{Titan}. In \textit{Tober}, the attorney for potential claimants against the Metropolitan Dade County Transit Agency (MTA) sought inspection of MTA’s accident reports. Officials at MTA transferred the reports to their attorneys and then claimed that they were exempted from the disclosure requirements of the Public Records Act because of attorney-client and work product privileges.\textsuperscript{120} On the attorney-client issue, the court admitted that "the legislature may have effectively amended the Public Records Act as contem-

\begin{thebibliography}{9}
\bibitem{115} Id. at 165 n.3.
\bibitem{116} Id. at 165.
\bibitem{117} Id. at 166.
\bibitem{118} Id. (citation omitted) (quoting FLA. STAT. § 90.502 (1981)).
\bibitem{119} 417 So. 2d 1053 (Fla. 3d DCA 1982), \textit{petition for review denied}, 426 So. 2d 27 (Fla. 1983).
\bibitem{120} Id. at 1055.
\end{thebibliography}
plated by the *Wait* opinion."\(^{121}\) However, the court did not have to decide the issue because the documents sought were not attorney-client communications and could not give rise to any claim of attorney-client privilege. Judge Nesbitt explained, "[W]e expressly decline to venture into the area of statutory construction because we otherwise determine that there simply is no attorney-client privilege present in the instant case."\(^{122}\)

The Third District Court of Appeal came closer to approving the *Titan* rationale in *Donner v. Edelstein*.\(^{123}\) The trial court in *Donner* had ordered dismissal of a mandamus petition that sought discovery relating to pending litigation. Petitioner claimed a right to inspect records pursuant to the Public Records Act. The district court held that the trial court's order was a "bare bones order of dismissal, which recite[d] only that the relators have not made out a prima facie case."\(^{124}\) Therefore, the case was remanded with directions to order respondents to show cause why the order should not be granted.\(^{125}\) Because the trial court did not state grounds for dismissal, the district court said it would "leave for another day" the question of whether the Evidence Code created an exception to chapter 119.\(^{126}\)

On remand, the trial court held that the documents did not have to be disclosed because the attorney-client privilege did create an exception to the disclosure requirements. When the case was appealed for the second time, the Third District Court of Appeal seemed to tacitly accept such a holding.\(^{127}\) Although the case was remanded to the trial court again, it was remanded only with instructions to examine in camera the documents being withheld from disclosure under the claim of privilege. The district court’s main concern seemed to be the fact that the trial court should not have permitted the city to decide unilaterally which documents were covered by the privilege.\(^{128}\)

The Third District again implied its acceptance of an attorney-client privilege exception in *Parsons & Whittemore, Inc. v. Metropolitan Dade County*.\(^{129}\) The trial court in *Parsons* had ordered

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\(^{121}\) *Id.* (footnote omitted).

\(^{122}\) *Id.*

\(^{123}\) 415 So. 2d 830 (Fla. 3d DCA 1982) (per curiam).

\(^{124}\) *Id.* at 831.

\(^{125}\) *Id.*

\(^{126}\) *Id.*

\(^{127}\) *Donner v. Edelstein*, 423 So. 2d 367, 367 (Fla. 3d DCA 1982) (per curiam).

\(^{128}\) *Id.*

\(^{129}\) 429 So. 2d 343 (Fla. 3d DCA 1983) (per curiam).
inspection of documents during discovery prior to a lawsuit against Dade County. The county claimed a privilege, and the district court remanded to the trial court with directions to examine the documents in camera to determine which, if any, were actually work product rather than attorney-client documents. Because the work product exception to the Public Records Act had not yet been enacted, documents that were work product would be required to be disclosed. However, the court's reference to its decision in Donner could imply that attorney-client privilege documents were exempt from disclosure.130

Similar implicit approvals of the attorney-client privilege exception to the Public Records Act occurred in City of Williston v. Roadlander,131 Hillsborough County Aviation Authority v. Azzarelli Construction Co.,132 and Aldredge v. Turlington.133

By 1984, although Titan remained the only reported decision that expressly recognized an attorney-client privilege exception, there seemed to be a clear trend toward acceptance of such an exemption from the Act. But in February 1984, despite earlier opinions from the Third District that seemed to accept the exemption, that court rejected claims of an attorney-client exemption in Miami Herald Publishing Co. v. City of North Miami.134

In the Miami Herald case, the Herald sought disclosure of several City of North Miami litigation files pursuant to the Public Records Act. The city relied upon the attorney-client privilege to claim that the documents did not have to be disclosed. The trial court denied the Herald's petition and refused to force disclosure. On appeal, the Third District Court of Appeal remanded for an in camera inspection of the documents to determine which records, if any, were protected, and which records must be disclosed.135 Following an in camera inspection, the trial court found that certain written communications between the members of the North Miami City Council and the city attorney were exempt from disclosure because they qualified under the attorney-client privilege. The

130. Id. at 345.
131. 425 So. 2d 1175 (Fla. 1st DCA 1983).
132. 436 So. 2d 153 (Fla. 2d DCA 1983).
133. 378 So. 2d 125 (Fla. 1st DCA) (per curiam), cert. denied, 383 So. 2d 1189 (Fla. 1980). Aldredge is noted in Comment, Exceptions to the Sunshine Law and the Public Records Law: Have They Impaired Open Government in Florida?, 8 FLA. ST. U.L. REV. 265, 290 (1980).
134. 452 So. 2d 572 (Fla. 3d DCA 1984).
Miami Herald again appealed, and the Third District Court of Appeal reversed and held that the documents were not exempt from the Public Records Act.\textsuperscript{136}

The district court relied upon Wait v. Florida Power & Light Co. and held that only public records provided by statute to be confidential or expressly excepted by general or special law were exempt from the disclosure requirements of the Public Records Act.\textsuperscript{137} Judge Jorgenson, writing for the court, admitted that the Evidence Code did allow a client the privilege of refusing to disclose confidential communications between lawyer and client, but he stated that the Code was limited in its applicability. The Evidence Code, he reasoned, was only applicable to the admissibility of evidence and burdens of proof at hearings and trials. Therefore, there was no indication that the legislature intended to abrogate the disclosure requirements of the Public Records Act when it enacted the Evidence Code.\textsuperscript{138}

The court admitted that its holding had the effect of placing governmental entities at a disadvantage when compared to private persons. Nevertheless, the court concluded that if there was to be an exemption from the Public Records Act based on the attorney-client privilege, then it was the legislature that must enact such an exception. Because of the continuing significance of the question, the court decided to give the supreme court the opportunity to revisit the issue. The district court certified the following question to the supreme court: "Does the lawyer-client privilege section of the Florida Evidence Code exempt from the disclosure requirements of the Public Records Act written communications between a lawyer and his public-entity client?"\textsuperscript{139}

The district court holding was affirmed by the Florida Supreme Court in City of North Miami v. Miami Herald Publishing Co.\textsuperscript{140} In its opinion, the court states that there is "no question that the written communications at issue are public records subject to chapter 119."\textsuperscript{141} The court then commented upon two of the arguments raised by the petitioners. Regarding the assertion that "their constitutional rights of due process, effective assistance of counsel, freedom of speech, and [the supreme court's] exclusive ju-

\begin{itemize}
\item \textsuperscript{136} City of North Miami, 452 So. 2d at 572.
\item \textsuperscript{137} Id. at 573.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id. at 574.
\item \textsuperscript{140} 468 So. 2d 218 (Fla. 1985).
\item \textsuperscript{141} Id. at 219.
\end{itemize}
risdiction over The Florida Bar prohibit public disclosure,” the court relied upon the rationale used in rejecting those same arguments in Neu. That reasoning was summarized with this somewhat circular explanation:

The legislature has the constitutional power to regulate disclosure of public records of the state and its political subdivisions and has done so through chapter 119. The communications (public records) belong to the client (government entity), not the lawyer, and the legislature, not this Court, regulates disclosure of public records.¹⁴²

The court also rejected a related argument made by the City of North Miami that the council members were constitutionally entitled, as individuals, to private communications with the city’s attorney. The court labeled this argument fallacious and noted that “[t]he city attorney furnishes legal assistance to council members in their official capacity, not as individual citizens.”¹⁴³

Finally, the court rejected the petitioner’s argument that the statutory attorney-client privilege creates an exception to the Public Records Act. In rejecting that argument, the court relied on the significance of the newly enacted work product exception to the Public Records Act.¹⁴⁴ Noting that courts should not assume that the legislature acted pointlessly, the court stated:

If chapter 90 provided a permanent exemption for attorney/client communications between government agencies and their attorneys, as petitioners urge, it would have been pointless for the legislature to enact a temporary [work product] exemption during pendency of litigation.¹⁴⁵

Thus, the supreme court concluded that because the legislature created a work product exception to the Public Records Act, no attorney-client privilege exception should be recognized. This explanation is remarkable in that it ignores the fact that work product is not necessarily material that would have been covered under an attorney-client privilege exception. Work product is material prepared by an attorney in anticipation of litigation. Although it may include material discussed by attorney and client, it fre-

¹⁴² Id.
¹⁴³ Id.
¹⁴⁴ See supra notes 23-26 and accompanying text.
¹⁴⁵ City of North Miami, 468 So. 2d at 219.
quently consists of material that the client is not at all involved in preparing. Thus, it is possible that the legislature intended to create a work product exception to protect from disclosure material that was not already protected by the attorney-client privilege. Yet the supreme court ignored the distinction between work product and attorney-client communications, and on this questionable basis held that the attorney-client privilege did not create an exception to the Public Records Act.

Justice McDonald, again joined by Justice Alderman, dissented from the result in the *City of North Miami* case. In his dissent, he reiterated his views in the *Neu* case and stated that the Evidence Code did create an exception to the Public Records Act. In support of his opinion, Justice McDonald noted that the Code expressly designated communications between an attorney and client as "confidential," and that the Public Records Act exempts records presently provided by law to be "confidential."146

IV. Effect of the Recent Cases That Hold There Is No Exception to the Open Government Laws

In reviewing the effect of the *Neu* and *City of North Miami* opinions, there are two areas of inquiry which must be examined. First, are these opinions likely to be the final pronouncements by the Florida Supreme Court on the issue? Second, under these holdings what options are available to public entity clients seeking to consult with their attorney?

A. Continuing Validity of Neu and City of North Miami

In view of the variety of opinions expressed by the justices on these issues, it seems likely that future cases will result in at least a fine tuning of the rules that will be applied in cases dealing with the conflict between open government laws and the attorney-client privilege.

For example, regarding the Sunshine Law: two justices dissented from the opinion147 and two justices specially concurred to say that communications between a governmental executive and an attorney could be confidential. In light of this fact, it is likely that the majority of the court would approve of confidential communications by a governmental executive.

146. *Id.* at 220.
147. One of the dissenters, Justice Alderman, has recently resigned from the court. Obviously, this too could have an effect on the outcome of future cases.
However, no such special concurrence was included in the Public Records Act case. Therefore, the questions of whether “public records” could be prepared exclusively by a governmental executive in order to avoid disclosure requirements of the Public Records Act is much more speculative. But in light of the many exemptions already available under the Act, it is likely that such a question would never arise.

B. Options Available to Governmental Entity Clients

Only time will reveal what the lasting impact of the Neu and City of North Miami decisions will be. But at the present time, those cases are the law and they appear to provide three options to governmental entity clients who seek to consult with their attorneys.

The first option is to continue to hold meetings with attorneys “in the sunshine.” It is likely that in many cases, this is the option that will be followed. In most circumstances, governmental entities find that it is perfectly acceptable to receive advice from their attorneys in public. Only in rare instances, such as in discussions of pending litigation and particularly settlement negotiations, do governmental entities seek privacy in their discussions with counsel. In those circumstances, the governmental entity may choose the second option which seems to be available. That option is to delegate authority to settle cases to an executive and let the executive conduct the discussions in private.148

The final option available to public entity clients is one that the supreme court has repeatedly stated as the one option available to litigators unhappy with the pronouncements of the court. That advice is to take the complaints to the legislature. Since there is now a positive pronouncement by the courts that they do not intend to construe the Evidence Code as providing an attorney-client exception to the open government laws, it appears that it is indeed the time to take the complaints to the legislature.

V. Conclusion

Florida’s open government laws—the Public Records Act and the Sunshine Law—promote the important public policy of openness in the state’s decisionmaking process. But application of those

laws interferes with another important policy—the right of public entity clients to receive effective legal advice in confidence. The legislature has enacted the attorney-client privilege section of the Florida Evidence Code to promote that policy.

The open government laws and the attorney-client privilege do not refer to each other, so a question arose about the relation between them. The supreme court has recently held that the privilege does not create an exception to the Sunshine Act or the Public Records Act. As a result of these recent holdings, governmental entity clients must conduct discussions with their attorneys in the sunshine and disclose all non-exempt public records. Governmental entities can choose to avoid the harsh consequences that can occur when pending litigation is to be discussed by delegating authority to their executive officer, who will likely be permitted to claim an attorney-client privilege. The only other option available to governmental entities seeking to consult privately with attorneys is to urge the legislature to change the law to permit such confidential communications.